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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FREDERICK MERANO, Defendant and Appellant.	B156259 (Super. Ct. No. BA220457)

APPEAL from the judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed and modified, with directions.

Mark A. Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Frederick Merano of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found true the allegations that the offense was committed for the benefit of a street gang and that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle. (§§ 186.22, subd. (b)(1), 190.2, subd. (a)(21).)

The court sentenced appellant to a term of life without the possibility of parole (LWOP) on count 1 and imposed 10 years for the street gang enhancement. The court ordered appellant to pay a $200 restitution fine (§ 1202.4, subd. (b)) and imposed and suspended a $200 parole revocation fine (§ 1202.45).

On appeal appellant contends: (1) the evidence is insufficient to support the finding that the murder was committed for the benefit of a criminal street gang; (2) section 186.22 does not authorize a determinate sentence enhancement to be added to the indeterminate life term; (3) the drive-by shooting special circumstance finding and the resulting LWOP sentence violate the Eighth and Fourteenth Amendments because the elements supporting the special circumstance are identical to those elevating the crime of murder to first degree, thus leaving no basis to distinguish a special circumstance offender from a nonspecial circumstance offender; and (4) the judgment must be modified to strike the parole revocation fine imposed pursuant to section 1202.45.

FACTS

I. Prosecution

On July 2, 2001, at approximately 1:30 p.m., Dale Herron witnessed a shooting near a park located between Budlong Avenue and 42nd Streets. Herron heard six or seven gunshots and saw a man, later identified as Derrick Wence, fall to the ground. He also saw that a newer model white truck with an extended cab was leaving the scene.

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1 All further statutory references are to the Penal Code unless otherwise stated.

Herron, who was standing approximately half a block away, did not see how many people were in the truck. Herron called 911.

James Moore also heard the gunshots. Moore saw the victim standing approximately two feet from a late model, "white silverish Dodge Chevy" truck. The driver's side of the truck was nearest Wence. When Wence fell down onto the street, the truck drove off. Moore saw at least two African-American males in the truck. He believed the driver was wearing a "yellowish gold" shirt.

Police arrived and established a crime scene. Wence was unconscious and had no pulse. Police collected six expended bullet shell casings at the scene, the ends of which were stamped with "A-M-E-R-C and 40 S and W." Police also found two bullet fragments and Wence's cellular telephone and a ring. A subsequent autopsy of Wence's body revealed that he died from multiple gunshot wounds.

Officer Owen Mills was riding in his marked patrol car when he heard the dispatch regarding a shooting involving a silver or gray Dodge pickup truck. The dispatch indicated the truck was traveling towards Mills. Near the intersection of Figueroa and 62nd Streets, Mills saw a white truck in which three African-American males were traveling. The three men turned and looked toward Mills, and Mills made a U-turn in order to follow them. The truck quickly changed lanes and ran a red light. When the truck made a right turn on 65th Street, Mills lost sight of it for a few seconds. On rounding the corner, Mills saw the truck traveling with its passenger side doors hanging open. The driver, later identified as appellant, continued driving at great speed, ran a red light, and eventually stopped near the intersection of Vermont Avenue and 68th Street. At that point, appellant got out of the truck and ran through an alley toward 69th Street. Appellant was wearing a white T-shirt and black pants.

Police established a perimeter in the area where appellant fled, and began a search. At approximately 2:00 p.m., Sandra Hernandez, who lived on West 69th Street heard sirens. Shortly thereafter, she heard a man's voice coming from behind her house. The man asked her in English not to call the police. He then said in Spanish, "I have a lot of money." Hernandez saw the man sitting next to the metal screen door in the back of her

house. Hernandez and some people who were in her home went out the front door and signaled to the police. Hernandez told a police officer that there was a man in the back of her house. When the officer asked Hernandez if the man was Black, she replied that he was.

A police helicopter flew over the rear of Hernandez's house and confirmed appellant was there. Appellant was arrested approximately 20 minutes after he fled the van. He was sweating heavily and had injured himself while running from police. A police officer collected possible gunshot residue samples from appellant's hands.

Criminalist Collin Yamauchi determined that the samples from appellant's right hand contained gunshot residue. This meant that appellant either had fired a gun or handled a recently fired gun. He also could have been near someone who fired a gun.

It was later established that appellant had borrowed a white pickup truck from his girlfriend, Jameka Miller, at approximately 10:00 a.m. on the day of the shooting. Miller had rented the truck. Detective Niall Byrne recovered a black handbag from under the front passenger seat of the truck. The bag contained a knife, phone battery charger, nine expended casings, and a container holding .40-caliber Smith and Wesson bullets. These were of the same type of ammunition as the casings found at the scene. Firearms examiners determined that the shell casings found at the shooting scene had all been fired from the same handgun. No gun was found either on appellant or in the truck.

At appellant's trial, Officer David Corbet, a street gang expert, testified about the "Five-Nine Hoover Criminals" street gang. He stated that the gang had been known as the Hoover Crips in the early 1990s. The gang then changed its name to "Five-Nine Hoover Criminal Gangsters" (Five-Nine Hoover Criminals) because they had many enemies among the Crips. The Five-Nine Hoover Criminals gang claimed the territory bounded by Slauson Avenue, Vermont Avenue, the 110 Freeway, and Gage Avenue. Within that territory, they earned money through drug sales and protected the territory from rivals. The gang had two hand signs that represented the letter "H." Many members of the gang had tattoos or wrote graffiti with the numbers "5-9," the letters "HCG," or "F" and "N," or the word "Hoover." The primary activities of the Five-Nine

Hoover Criminals were street robberies, assault with deadly weapons, drive-by shootings, murder, rape, witness intimidation, narcotics sales, robberies and burglaries. Violent acts against members of the community or rival street gangs furthered the Five-Nine Hoover Criminals' goals by bolstering their reputation as a violent street gang. They engendered fear among neighboring gangs and intimidated rivals from encroaching on the Five-Nine Hoover Criminals' territory.

One of the Five-Nine Hoover Criminals' rivals was the Rolling 40 Neighborhood Crips (Rolling 40's) gang. Wence was a member of the Rolling 40's gang, and the park where he was killed was claimed by the Rolling 40's.

Appellant had tattoos indicating he was a Five-Nine Hoover Criminals gang member. His moniker was "Fred Dog." Jermaine King, a Five-Nine Hoover Criminals street gang member known as "Lil Man," was convicted of assault with a deadly weapon in February 2000. Dumar Fisher, another Five-Nine Hoover Criminals gang member known as "Baby Groove," was convicted of attempted murder, attempted robbery, and robbery.

When questioned regarding a hypothetical situation where a Five-Nine Hoover Criminals gang member participated in a drive-by shooting of a Rolling 40's street gang member in Rolling 40's territory, Corbet was of the opinion that the shooting would benefit the Five-Nine Hoover Criminals by increasing their reputation as a violent street gang. Furthermore, the gang members that did the shooting would be "highly revered" by fellow gang members. The shooting would benefit the Five-Nine Hoover Criminals gang by improving their recruitment of new members and increasing fear in the community. Community members would be less willing to cooperate with the police. Also, the Rolling 40's and other rival street gangs would be less likely to enter the territory claimed by the Five-Nine Hoover Criminals. Corbet was of the opinion that appellant was an active member of the Five-Nine Hoover Criminals street gang because of his tattoos and his involvement in the charged shooting.

II. Defense

Appellant presented no evidence on his behalf.

DISCUSSION

I. Sufficiency of the Evidence to Sustain the Street Gang True Finding

Appellant argues that there was insufficient evidence to support the finding that his crime was committed for the benefit of, at the direction of, or in association with a criminal street gang pursuant to section 186.22, subdivision (b)(1). According to appellant, "[t]he fact that a current or former gang member attacks a current or former member of a rival gang in the latter gang's territory is insufficient to constitute solid credible evidence to support [a gang allegation]." Therefore, the true finding violates state and federal due process rights.

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Given this court's limited role on appeal, appellant bears an enormous burden in claiming there was insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Reversal for insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Accordingly, when the evidence is largely circumstantial, reversal is not warranted simply because the evidence might support contrary findings equally as well as those made by the trier of fact. (*People v. Ceja*, *supra*, 4 Cal.4th 1134, 1139.)

Section 186.22, subdivision (b)(1), provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." A section 186.22 gang enhancement may be

proved through the testimony of an expert witness. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506, 508 [trial court properly allowed expert opinion as to whether an incident was gang-related].)

We conclude that sufficient circumstantial evidence supports the jury's true finding. Appellant was a known member of the Five-Nine Hoover Criminals gang who took part in a drive-by shooting of a known member of a rival gang. The shooting of the Rolling 40's gang member took place in the Rolling 40's territory. Corbet, the gang expert, testified that the participation of a Five-Nine Hoover Criminals member in the killing of a Rolling 40's member in the latter's territory would benefit the Five-Nine Hoover Criminals. Such a shooting would increase the reputation of the Five-Nine Hoover Criminals gang. It would increase fear in the community and deter rival gang members from entering their territory. It would help recruit new members and ensure that no rival gang engaged in drug trafficking on Five-Nine Hoover Criminals' turf. There was no evidence of a prior relationship or personal animosity between appellant and Wence, and no evidence that the crime was committed in the course of a robbery. It was reasonable for the jury to infer, even in the absence of evidence of a specific vendetta, that appellant and his cohorts shot Wence to impress the community and their rivals and thus to benefit the Five-Nine Hoover Criminals. Sufficient evidence supports the jury's finding on the gang enhancement.

II. Determinate Sentence Enhancement to Indeterminate Life Term

Appellant argues that the 10-year gang enhancement must be stricken because the consecutive determinate enhancement constitutes an unauthorized sentence. When the underlying crime carries a term of life imprisonment, the determinate term authorized by section 186.22, subdivision (b)(1) is not applicable.[2]

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2 The 2001 version of section 186.22, subdivision (b)(1) provides: "Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment

In *People v. Ortiz* (1997) 57 Cal.App.4th 480 (*Ortiz*), the court stated that the plain language of section 186.22, subdivision (b)(1) excepts prisoners serving a life term from an additional determinate term under the statute. (*Ortiz*, at p. 485.) The court was referring to the language in former subdivision (b)(1) that provided: "'*Except as provided in paragraph (4)*, [when a defendant] is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .'" (*Ortiz*, at p. 485.) The language in former paragraph (b)(4) provided that "'[a]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life,* shall not be paroled *until a minimum of 15 calendar years have been served*.'" (*Ortiz*, at p. 485.) The court pointed out that there was nothing in the statute to suggest that the extended parole eligibility limitation period should be combined with an additional determinate term. (*Id*. at pp. 485-486; see also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465.)

In *People v. Herrera* (2001) 88 Cal.App.4th 1353 (*Herrera*), however, the court found *Ortiz*'s reasoning did not apply when the life sentence imposed contained a requirement that the defendant serve a minimum of 25 years of his life sentence. (*Herrera*, at p. 1359.) Referring to section 190, which prescribes a term of 25 years to life as one of the possible sentences for first degree murder, *Herrera* states: ". . . the 15-year statutorily adopted minimum term [in section 186.22, former subdivision (b)(4)] is inconsistent with the 25-year minimum term [in section 190] chosen by the voters through the initiative process. We construe the language in section 186.22, former subdivision (b)(1) '[e]xcept as provided by paragraph (4)' to mean that if paragraph (4) *is inapplicable for any reason*, then the one of the three determinate terms [of the section

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prescribed for the felony or attempted felony of which he or she had been convicted, be punished by an additional term of two, three, or four years at the court's discretion . . . . If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

186.22, subdivision (b)(1) enhancement] applies to the defendant."[3] (*Herrera*, *supra*, at p. 1364, italics added.) *Herrera* upheld imposition of a three-year section 186.22, subdivision (b)(1) enhancement to the defendant's 25-year-to-life term for first degree murder. (*Herrera*, at p. 1364.)

In the instant case as well, the language prescribing a minimum term of 15 years for anyone violating section 186.22, subdivision (b) by committing a felony punishable by imprisonment for life is inapplicable to appellant. (§ 186.22, subd. (b)(5).) A 15-year minimum term is inherently inconsistent with an LWOP sentence. Therefore, we conclude that the trial court properly imposed the determinate sentence enhancement of 10 years pursuant to section 186.22.

III. Elements of Drive-by Shooting Special Circumstance

Appellant argues that the special circumstance of murder by means of discharging a firearm from a motor vehicle was unconstitutionally applied in his case, since one of the prosecution's theories of first degree murder was based on the identical elements of the special circumstance. According to appellant, because there is no basis for a jury to distinguish between the factual findings necessary to find a defendant guilty of first degree murder[4] from the findings necessary to enter a true finding on the drive-by special

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3 In the 2001 version of the statute and currently, the language describing the 15-year minimum parole eligibility period is found in paragraph (5) of section 186.22, subdivision (b). Paragraph (b)(4) was amended to prescribe specific sentences for home invasion robbery, carjacking, extortion, discharging a firearm from a motor vehicle, and threats to victims and witnesses. (§ 186.22, subd. (b)(5).)

4 CALJIC No. 8.25.1 set out one of the prosecution's theories of first degree murder for the jury: "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree." It is not clear whether the jury found appellant guilty of first-degree murder on this basis, but we will assume so for the purpose of discussion.

circumstance,[5] the use of the special circumstance finding as a basis for a sentence of death or LWOP violates the prohibition against cruel and unusual punishment and the right to due process of law.

This court found in *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 164 (*Rodriguez*), that the identical claim had no merit. We cited *Lowenfield v. Phelps* (1988) 484 U.S. 231[6] for the principle that special circumstances may duplicate elements that define a defendant's crime as first degree murder. (*Rodriguez*, *supra*, at p. 164.) In *People v. Edelbacher* (1989) 47 Cal.3d 983 as well, the court clearly indicated such an argument would have no merit in regard to the special circumstance of lying-in-wait. (*Id*. at p. 1023, fn. 12.) Arguments similar to appellant's have been consistently rejected by the California Supreme Court. (See *People v. Wader* (1993) 5 Cal.4th 610, 669; *People v. Webster* (1991) 54 Cal.3d 411, 455-456; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946; *People v. Gates* (1987) 43 Cal.3d 1168, 1188-1189.) We reject appellant's constitutional claims.

IV. Parole Revocation Fine

Appellant contends that this court should order the judgment to be modified to strike the parole revocation fine, since appellant's sentence does not allow for the possibility of parole. Respondent agrees.

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5 The jury was instructed on the special circumstance allegation as follows: "To find that the special circumstance, referred to in these instructions as murder by means of an intentional discharge of a firearm from a motor vehicle, is true, it must be proved: [¶] 1. The murder was perpetrated by means of discharging a firearm from a motor vehicle; [¶] 2. The perpetrator intentionally discharged the firearm at another person or persons outside the vehicle; and [¶] 3. The perpetrator, at the time he discharged the firearm, intended to inflict death."

6 In *Lowenfield v. Phelps*, the court defeated the claim of a defendant, sentenced to death, who argued that he was found guilty of first degree murder based on the theory that he had "'a specific intent to kill or to inflict great bodily harm upon more than one person . . .'" and was then sentenced to death based on the sole aggravating factor that he had " 'knowingly created a risk of death or great bodily harm to more than one person.'" (*Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 242-243.)

As the court stated in *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183, the language of section 1202.45 is clear. A parole revocation fine can only be imposed in a case where a sentence includes a period of parole. (*People v. Oganesyan*, at p. 1183.) Therefore, the judgment must be modified.

DISPOSITION

The judgment is modified to strike the parole revocation fine imposed pursuant to section 1202.45. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST